A **SHAMIM REZA ABDUL SAMAD**

v.

PP

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASHIM YUSOFF FCJ
GOPAL SRI RAM FCJ
[CRIMINAL APPEAL NO: 05-6-2009(B)]
C 15 SEPTEMBER 2009
[2009] CLJ JT(5)

CONSTITUTIONAL LAW: *Fundamental liberties - Right to fair hearing - Right to be represented by competent counsel - Whether part of*
D *right to fair hearing - Sankar v. The State - Chong Ching Yuen v. The Hong Kong Special Administrative Region - Federal Constitution, art. 5(1)*

LEGAL PROFESSION: *Duty to client - Conduct of criminal trial -*
E *Incompetence of counsel in conduct of defence - Whether grounds for setting aside conviction - Whether flagrant or gross incompetence must be shown - Whether accused deprived of fair hearing occasioning miscarriage of justice*

CRIMINAL PROCEDURE: *Trial - Conduct of defence - Incompetence*
F *of counsel - Whether grounds for setting aside conviction - Whether flagrant or gross incompetence must be shown - Whether accused deprived of fair hearing occasioning miscarriage of justice*

CRIMINAL LAW: *Murder - Appeal against conviction and death*
G *sentence - Incompetence of counsel in conduct of defence - Whether grounds for setting aside conviction - Whether flagrant or gross incompetence must be shown - Whether accused deprived of fair hearing occasioning miscarriage of justice*

H The appellant was convicted of the offence of murder of one Zuriyati Othman and sentenced to death. His defence before the High Court was that some third person had committed the offence. That defence was never put to the prosecution witnesses and the learned judge had rejected it as an afterthought. Before
I the Court of Appeal and before the Federal Court, the appellant argued that he had not been given a fair hearing by reason of the incompetence of his counsel. The issues were whether the

incompetence of counsel was a legitimate ground for an appellate court to intervene and set aside a conviction, and if yes, whether the present appeal was one in which such intervention was warranted.

Held (dismissing the appeal; affirming conviction and sentence)

Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) Article 5(1) of the Federal Constitution guaranteed that neither life nor personal liberty may be deprived save in accordance with law. The right to a fair hearing is a constitutionally guaranteed right. The question was whether the right to be represented by competent counsel formed part of the right to a fair hearing. Lord Woolf in *Sankar v. The State* put the test as follows – "In an extreme situation where the defendant is deprived of the necessities of a fair trial, then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice". An "extreme situation" must depend on the facts of each case. The authorities envisaged a case where there had been a flagrant or gross incompetence on the part of counsel so as to deprive an accused of a fair hearing. The leading case on the subject was *Chong Ching Yuen v. The Hong Kong Special Administrative Region.* It followed that a conviction might be quashed on the incompetence of counsel in the conduct of a defence in a criminal trial provided that (1) such incompetence was flagrant in the circumstances of the case; and (2) it deprived the accused of a fair hearing thereby occasioning a miscarriage of justice. An appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court – whether at first instance or at the appellate state – should have regard to its paramount function and duty to ensure that justice was done so that the incompetence of counsel would not factor into the equation. (paras 3, 4, 5 & 6)

(2) The evidence in the present case made it clear that no person other than the appellant was in the room at the material time. The possibility of a third person having entered the room was far-fetched and a reasonable tribunal of fact would have

A rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded that line of defence had occasioned no miscarriage of justice on the facts of the case. (para 7)

B **(3)** This was not an extreme case of incompetence on the part of counsel. Equally this was a case in which the appellant, having been properly and deservedly convicted, had sought to suggest flagrant incompetence on the part of counsel. The trial could have been conducted with greater
C competence than that displayed by counsel for the appellant. However, there was no flagrant incompetence on the material before this court and no miscarriage of justice was occasioned. (para 8)

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah disabit atas kesalahan membunuh seorang Zuriyati Othman ('si mati') dan telah dijatuhkan hukuman mati. Di hadapan Mahkamah Tinggi pembelaan beliau adalah bahawa pembunuhan dilakukan oleh satu pihak ketiga. Pembelaan perayu
E bagaimanapun telah tidak diajukan kepada saksi-saksi pendakwaan dan yang arif hakim telah menolaknya sebagai satu rekaan semata-mata. Di hadapan Mahkamah Rayuan dan juga Mahkamah Persekutuan, perayu berhujah bahawa beliau telah tidak mendapat suatu perbicaraan yang adil disebabkan oleh kecuaian peguamnya.
F Isu-isu yang berbangkit adalah sama ada ketidakkompetenan seseorang peguam boleh menjadi satu alasan sah untuk sebuah mahkamah rayuan campurtangan dan mengenepikan sabitan, dan jika begitu, sama ada rayuan semasa merupakan suatu kes di mana campurtangan sedemikian adalah wajar.

G **Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)**
Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

H **(1)** Fasal 5(1) Perlembagaan Persekutuan memberi jaminan bahawa nyawa seseorang mahupun kebebasannya sekali-kali tidak boleh digugat kecuali menurut kehendak undang-undang. Hak kepada suatu perbicaraan yang adil adalah hak yang dijamin oleh
I perlembagaan. Soalnya di sini adalah sama ada hak untuk diwakili oleh peguam yang berkompeten merupakan sebahagian dari hak kepada perbicaraan yang adil. Lord Woolf dalam

Sankar v. The State melakarkan ujiannya seperti berikut – "Dalam keadaan yang keterlaluan di mana defendan telah dinafikan keperluan-keperluan yang menjadi ciri perbicaraan yang adil, maka, walaupun peguam beliau sendiri yang bertanggungjawab atas apa yang berlaku, sesebuah mahkamah rayuan mungkin akan membatalkan sabitan dan akan berbuat demikian jika salah laksana keadilan kelihatan telah berlaku". Kes utama bagi persoalan ini adalah *Chong Ching Yuen v. The Hong Kong Special Administrative Region*. Ianya mengikut bahawa sesuatu sabitan mungkin boleh dibatalkan ekoran ketidakkompetenan seseorang peguam dalam menjalankan pembelaan dalam suatu perbiaraan jenayah, dengan syarat bahawa (1) ia adalah satu ketidakkompetenan yang amat ketara; dan (2) ia telah menafikan tertuduh suatu perbicaraan yang adil sekaligus membangkitkan salah laksana keadilan. Apapun, sebuah mahkamah rayuan harus mengambilkira tingkah laku peguam secara keseluruhannya dan bukannya kegagalan beliau dari satu-satu sudut tertentu sahaja. Selain itu, dalam keadaan biasa, sesebuah mahkamah – sama ada mahkamah awalan atau mahkamah peringkat rayuan – akan sentiasa sedar kepada fungsi dan tugas utamanya untuk menegakkan keadilan dan sekaligus tidak akan menjadikan ketidakkompetenan peguam sebagai satu faktor dalam pertimbangannya.

(2) Keterangan dalam kes semasa jelas menunjukkan bahawa selain dari perayu tiada orang lain berada di bilik tersebut pada waktu material. Kemungkinan seorang orang ketiga telah memasuki bilik adalah agak mustahil dan suatu tribunal fakta yang munasabah akan menolaknya sebagai tidak membangkitkan sebarang keraguan di fikirannya. Oleh itu, fakta bahawa hakim bicara telah menolak jalur pembelaan tersebut tidak membangkitkan apa-apa salah laksana keadilan berdasarkan fakta kes.

(3) Ini bukan suatu kes ketidakkompetenan yang keterlaluan di pihak peguam. Begitu juga, ini adalah kes di mana perayu, yang disabitkan dan dihukum dengan sewajarnya, cuba membangkitkan soal ketidakkompetenan di pihak peguam. Perbicaraan mungkin boleh dijalankan dengan cara yang lebih berkompeten dari apa yang ditunjukkan oleh peguam perayu. Namun, tidak terdapat ketidakkompetenan yang ketara berdasarkan material yang ada di hadapan mahkamah ini dan tidak berlaku apa-apa salah laksana keadilan.

Case(s) referred to:
Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***
Chong Ching Yuen v. The Hong Kong Special Administrative Region [2004] HKCFA 16 ***(refd)***
Lee Kwan Woh v. PP [2009] 1 LNS 778 FC ***(refd)***
PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329 HC ***(refd)***
R v. Birks [1990] 48 A Crim R 385 ***(refd)***
Sankar v. The State [1994] UKPC 1 ***(refd)***
Wong Lai Fatt v. Public Prosecutor [1973] 1 LNS 175 FC ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)

For the appellant - Datuk N Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondent - Ahmad Bache; AG's Chambers

[Appeal from Court of Appeal, Criminal Appeal No: B-05-71-2007]

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram FCJ:

[1] The appellant was convicted by the High Court of the offence of murder and sentenced to death. His appeal to the Court of Appeal was dismissed. He has now appealed to us.

[2] The substance of the prosecution's case is that the appellant murdered one Zuriyati Othman ("the deceased") on 9 August 2002 between 11am and 12noon. The offence is said to have taken place at No. 101, Blok A, Kolej Kediaman Meranti, UITM, Seksyen 2, Shah Alam, in the district of Petaling, Selangor Darul Ehsan. The evidence led in support of this case is as follows. The appellant and the deceased had had a relationship which became estranged. On the day in question, the appellant called at the deceased's flat. Later, the deceased's sister (PW10) heard a cry from the deceased. It came from the deceased's room. PW10 could not enter the room as it was locked from inside. She looked for the spare key, found it, opened the door and entered the room. She found only two persons there: the deceased and the appellant. The deceased was lying on her bed. She had been

stabbed several times. She succumbed to her wounds. The appellant also had injuries. A large knife (referred to as "a Rambo knife") was found in the room. It was identified as the probable weapon used to inflict the wounds upon the deceased. Based on these pieces of evidence the prosecution argued that it was the appellant who stabbed the deceased and that he did so with the intention of causing her death. The appellant's case before the High Court was that it was some third person who had stabbed the deceased and caused her death. This defence was never put to the prosecution witnesses. The trial judge rejected it as an afterthought. Before the Court of Appeal and before us, the appellant advanced the argument that he had not had a fair trial by reason of the incompetence of counsel assigned to conduct the defence. Questions essential to present the defence to the prosecution were never put to the latter's witnesses. In particular, the defence of a third person having been the assailant was not suggested to PW10. There had simply been no attempt to conduct a searching cross examination of the main prosecution witnesses. All this when taken together demonstrates that counsel who conducted the defence was incompetent in consequence of which the appellant had been deprived of his right to a fair trial. So much for the submissions.

[3] In our view, the argument advanced by the appellant gives rise to two separate issues. First, whether the incompetence of counsel is a legitimate ground upon which an appellate court may intervene to set aside a conviction. Second, if the first question is resolved affirmatively, then, whether the present appeal is one in which such intervention is warranted. Take the first point. The starting point for this is art. 5(1) of the Federal Constitution which guarantees that neither life nor personal liberty may be deprived save in accordance with law. In accordance with the principles of interpretation discussed and accepted by this court in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521, the expressions "life" and "personal liberty" must be interpreted generously and given a wide meaning. In *Lee Kwan Woh v. Public Prosecutor* [2009] 1 LNS 778, this court held that the fundamental liberties expressed in the Constitution must be read in a prismatic fashion to discover the rights submerged in the wider concepts expressly guaranteed. This court also affirmed as accurate the following statement of the law by Edgar Joseph Jr J (as he then was) in *Public Prosecutor v. Choo Chuan Wang* [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329:

> Article 5(1) of our Constitution does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in *Madheshwardhari Singh v. The State (ibid) (Madheshwardhari Singh and Anor. v. State of Bihar* [1986] AIR (Pat) 324), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground.

We therefore accept that the right to a fair trial is a constitutionally guaranteed right.

[4] The question that now arises is whether the right to be represented by competent counsel forms part of the right to a fair trial. The authorities appear to provide an affirmative answer to that question. We do not find it necessary, as a starting point, to traverse beyond the judgment of Lord Woolf in *Sankar v. The State* [1994] UKPC 1, where he put the test as follows:

> In an extreme situation where the defendant is deprived of the necessities of a fair trial then even though it is his own advocate who is responsible for what has happened, an appellate court may have to quash the conviction and will do so if it appears there has been a miscarriage of justice.

[5] What is an "extreme situation" must depend on the facts of each case. The authorities appear to envisage a case where there has been a flagrant or gross incompetence on the part of counsel as to deprive an accused of a fair trial. In our view the leading case on the subject is *Chong Ching Yuen v. The Hong Kong Special Administrative Region* [2004] HKCFA 16. It is a decision of the Court of Final Appeal of Hong Kong, a court whose views are entitled to be treated with great respect. There, Bokhary PJ, reviewed several leading cases on the subject, including the decision of the New South Wales Court of Criminal Appeal in *R v. Birks* [1990] 48 A Crim R 385, where Gleeson CJ (later CJ of the High Court) formulated the following propositions which we consider to be good law:

> The relevant principles may be summarised as follows:
>
> 1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.

2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.

3. However, there, may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.

Bokhary PJ then said:

> An appellate court cannot shut its eyes to the unsafe or unsatisfactory state of a person's conviction just because that state was caused or contributed to by his counsel's incompetence. Nor can an appellate court shut its eyes to an error of law against a person just because that error was caused or contributed to by his counsel's incompetence. But it should be clearly understood that appellate courts will approach those situations with a sense of realism, and not in such a way as would put a premium on briefing incompetent defence counsel at trial and then criticising them on appeal in the event of a conviction. As Cooke J (now Lord Cooke of Thorndon) said (at p. 114) in the course of delivering the judgment of the Court of Appeal of New Zealand in *R v. Pointon* [1985] 1 NZLR 109, it is necessary 'to be on guard against any tendency of accused persons who have been properly and deservedly convicted to put the result down, not to the crime committed, but to the incompetence of counsel'.

[6] That, then, is the state of the authorities. In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard

A to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation. As the Federal Court said in *Wong Lai Fatt v. Public Prosecutor* [1973] 1 LNS 175:

B > The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v. Olby Ltd* [1969] 2 QB 159, 166:
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> > We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.

C

[7] That brings us to the facts of the present case. The real complaint here is focussed upon the point that the deceased was killed by some person other than the appellant. It was submitted D for the appellant that the failure to put this to the witnesses for the prosecution was flagrant incompetence because it resulted in the trial judge declining to consider that line of defence altogether. With respect we cannot agree. The evidence makes it clear that no person other than the appellant was in the room at the E material time. The room was locked from within. This necessitated PW10 to look for the spare key. When she entered, the only person in the room other than the deceased was the appellant himself. The possibility of a third person having entered the room is, on the facts, so far-fetched that a reasonable tribunal of fact F would have rejected it as creating no reasonable doubt in its mind. Accordingly, the fact that the trial judge excluded that line of defence has occasioned no miscarriage of justice on the facts of this case.

G **[8]** Having regard to what we have said, we are satisfied that this is not an extreme case of incompetence on the part of counsel. Equally, we are satisfied that this is a case in which the appellant having been properly and deservedly convicted has sought to suggest flagrant incompetence on the part of counsel. H Before concluding we must say that the trial could perhaps have been conducted with greater competence than that displayed by counsel who appeared for the appellant at his trial. But there was, on the material provided to us, no flagrant incompetence. In any event, no miscarriage of justice has been occasioned. The appeal is therefore dismissed. The conviction and sentence are affirmed. I